FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 2 1964
JOHN F. DAVIS, CLERK

No. 550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

LAWRENCE Y. S. AU and
WRONA K. H. AU

Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE Y. S. AU, *Petitioner*
947 Koko Head Avenue
Honolulu, Hawaii 96816

INDEX

	PAGE
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes and rules involved	2
Statement	3
Reasons for granting the writ	4
Conclusion	6
Appendix	1a
Opinion	1a
Order Affirming Judgment	2a
Order Denying Petition for Rehearing	3a

CITATION

Helvering v. Owens, 305 U. S. 468 (1939)	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

LAWRENCE Y. S. AU and
WRONA K. H. AU,

Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioners, Lawrence Y. S. Au and Wrona K. H. Au, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The decision and judgment of the Ninth Circuit Court, affirming the judgment of the Tax Court, was entered on April 24, 1964.

The order denying the petition for rehearing followed on June 8, 1964. A certified copy of the judgment was issued on June 18, 1964.

The opinion and decision of the Court of Appeals above mentioned appear in the Appendix, *infra* (p.p. 1a-3a).

JURISDICTION

This petition is timely filed in the Supreme Court of the United States, as it is filed on or before October 6, 1964, in accordance with an order extending time to file, granted on August 13, 1964 by the Honorable Chief Justice of the United States. Jurisdiction of the Court is invoked under 28 U. S. C. 2101.

QUESTION PRESENTED

In establishing a basis for depreciation can the Commissioner of Internal Revenue reject, dispute, or ignore the value established through bargaining in order to favor a value authoritatively determined?

Or restated:

Can a "fair market value" determination be made when the question of the value of the asset on the specific date has already been settled and determined by bargaining?

STATUTE INVOLVED

Involved in this case is the Internal Revenue Code of 1954.

Specifically involved is the extent, scope or limitations, (if any) of the application of Reg. 1.167(f-1), which establishes as the basis for depreciation of non-business assets, the lessor of the fair market value at the time of conversion to business use or the adjusted basis.

STATEMENT OF THE CASE

The facts, pertinent and material to the consideration of the question presented are as follows:

1. On January 1, 1957, petitioner, Lawrence Y. S. Au, transferred his 1950 Plymouth sedan, purchased new in 1951, and with no prior business use to a partnership with his brother Alfred for the practice of accountancy. This was petitioner's sole contribution to the partnership, and the distribution of income and expenses by the partners was based in the main, upon the capital contributed.

2. The value agreed for the car by the partners was $2,500.00. (Transcript of proceedings before Tax Court: TR pg. 68, line 17-25. TR pg. 69, line 1-18).

3. The value of the car as of January 1, 1957, the point of the transfer was later determined by the Commissioner of Internal Revenue to be $650.00. The $650.00 was submitted as the basis for depreciation by the Internal Revenue Service in place of the $2,500.00 claimed by petitioner. A lessor amount of depreciation was allowed, resulting in a statutory deficiency. (Tax Court Exhibit 26-Z).

4. The Commissioner of Internal Revenue's determination of $650.00 as the value of the car as of January 1, 1957 was based upon the following:

a) Survey of advertisements (Tax Court Exhibit 19-S)

b) Kelly's Blue Book (Exhibit 21-U, Tax Court)

5. The Tax Court's opinion favored the respondent's fair market determination of $650.00.

6. The Ninth Circuit Court of Appeals affirmed the decision of the Tax Court.

7. Petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Tax Court, as affirmed by the Court of Appeals completely ignored and refused to consider all arguments that the value of the car as at January 1, 1957 had already been determined by bargaining to be $2,500.00 and therefore had rendered moot the need for the consideration of any "fair market value" determination.

The $2,500.00 was a value established by bargaining as contrasted with the $650.00 value authoritatively determined by the Commissioner of Internal Revenue, based upon his interpretations of newspaper advertisements and average prices in a "Blue book".

Petitioner feels the least he is entitled to is a full explanation why the $2,500.00 value established by his bargaining without any fraud, duress, intimidation or illegality, cannot be considered as "fair" but must be set aside for an authoritatively determined value of $650.00.

Petitioner had persistently argued and raised this question.

Before the Tax Court:

Petitioner's Brief - page 17, first paragraph.

Before the Circuit Court:

a. Petitioner's brief, page 13, line 2-12.
(argument that transfer was constructive sale.)

b. Petitioner's reply brief:
page 6 - line 13-27
page 7 - line 1
(Petitioner had argued against the infringement of his constitutional right to bargain and so to set values by bargaining.)

c. In the oral arguments before the Circuit Court, Petitioner had devoted his allotted time in a vain attempt to have the question now before this Court answered,

viz.; Where a value has been established by actual bargaining, can it be set aside in favor of one authoritatively determined?

d. In the petition for rehearing, the same question was raised and ignored.

II.

The ultimate issue may well be: Who has the right to determine values — the taxpayers through the process of free bargaining, or the Internal Revenue Service, through authoritatively determining values by references to "blue books" and interpretations of newspaper ads.

This question must be answered and determined conclusively in order that petitioner and the general public can be secured in the knowledge that the bargains they have struck and the resulting values they have established cannot be indiscriminately disregarded.

In this case the petitioner's welfare and future will be jeopardized by a reduction in the value of his contribution to the partnership, or from $2,500.00 to $650.00. It will raise havoc on his profit distribution percentage not only for 1957 but for all the subsequent years. For $2,500.00 was the value assigned to his car and therefore the value of his sole contribution to the partnership. To accept the authoritatively determined value of $650.00 as being "fair" would of necessity imply that the value of $2,500.00 originally bargained for by petitioner was "unfair" and overstated.

The question raised therefore is of paramount importance and cannot be ignored, but must be adjudicated. It must be determined in the case at hand whether the Commissioner of Internal Revenue has the right to set aside a value legitimately determined through bargaining and to superimpose an authoritatively determined value.

In the case of *Helvering v. Owens*, 305 U. S. 468 (1939) cited by the Circuit Court, the situation there involved the determination

of a value for a casualty loss. It is not comparable to this case in that there is no conflicting value determined by bargaining and hence the authoritatively determined value was without challenge.

Petitioner contends that the right to determine values has not been delegated to the United States by the Constitution, and therefore is reserved to the people under Article X of the Amendments to the Constitution.

Furthermore, this right to bargain and to determine values by bargaining, though not specifically enumerated in the Constitution is nevertheless one of the rights retained by the people.

As such, it is protected by Article IX of the Amendments to the Constitution, and therefore cannot be *denied* or *disparaged*.

The Federal question here to be decided is whether or not the setting aside of a value determined by bargaining and super-imposing an authoritatively determined value is a denial or disparagement of a constitutional right retained by the people and not delegated to the government.

CONCLUSION

The ignoring of a question persistently raised, the importance of which demands adjudication, as well as the existence of a federal question over which this Court has ultimate jurisdiction are in essence the moving reasons why this Court should be called upon to exercise its powers of supervision. It is respectfully submitted that this petition for a writ of certiorari be granted.

LAWRENCE Y. S. AU, *Petitioner*
947 KOKO HEAD AVE.
HONOLULU, HAWAII 96816

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE Y. S. AU and
WRONA K. H. AU
Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

No. 18,910

(April 24, 1964)

On Petition for Review of the Decision of the
Tax Court of the United States

Before: CHAMBERS, KOELSCH and BROWNING,
Circuit Judges.

Per Curiam:

The Tax Court held that the basis for depreciation of a non-business property which the taxpayers transferred to a business partnership as part of their contribution was the fair market value of such property at the time of such transaction (40 T. C. 31). This conclusion finds support in and is consistent with the doctrine implied in *Helvering v. Owens*, 305 U. S. 468 (1939).

The judgment of the Tax Court in determining a deficiency is affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE Y. S. AU and
WRONA K. H. AU
Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

No. 18,910
JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States .....

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States .....

.....

..... and was duly submitted.

On Consideration Whereof, it is now ordered and adjudged by this Court, that the ..... Decision of the said Tax Court of the United States in this Cause be, and hereby is affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, June 8, 1964

Before: CHAMBERS, KOELSCH and BROWNING, *Circuit Judges*

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of petitioners filed on May 25, 1964, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

LE COPY

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 550

LAWRENCE Y. S. AU and WRONA K. H. AU,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case involves the valuation, for depreciation purposes, of an automobile purchased by taxpayer Lawrence Y. S. Au [1] for $2,500 in 1950, used for personal purposes for about six years, and converted to business use in 1957. On his 1957 return, taxpayer

---

[1] Taxpayer Wrona, the wife of Lawrence, had no separate income and is a taxpayer solely because a joint return was filed.

used the original cost of $2,500 as his basis for depreciation. The Commissioner determined that the fair market of the automobile, when converted to business use in 1957, was $650. The question presented is whether the court below erred in sustaining the Tax Court's finding that the fair market value of the automobile for depreciation purposes was $650 (as the Commissioner determined) rather than the $2,500 value for which the taxpayer is contending.

Taxpayer recognizes (Pet. 2) that where (as here) a non-business asset is converted to business use, its basis for depreciation is the fair market value at the time of the conversion. Treasury Regulations on Income Tax (1954 Code), Section 1.167(f)-1. The Commissioner's determination that the automobile had a fair market value in 1957 of $650 is presumptively correct, and the burden of proving it wrong rested on the taxpayer. *Commissioner* v. *Hansen*, 360 U.S. 446, 468. In upholding the Commissioner's determination, the Tax Court found as a fact that, in 1957, "Plymouth automobiles of the model and type herein involved were being offered for sale in the Honolulu area, and could be purchased in good condition for less than $650. The Official Guide used in the Hawaii area representing the average of used car prices reflected the average retail price of 1950 Plymouth automobiles at less than $650. * * * The fair market value of the 1950 Plymouth automobile was not in excess of $650 when it was converted to business use in 1957." (R. 23.)

There is plainly no occasion to depart in this case from the precept that this Court will not ordinarily

review concurrent findings of fact. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214. The only testimony offered by taxpayer on the valuation question was that of his brother who stated that the car was in very excellent condition and was worth $2,500 at the time it was converted to business use. (R. 69, 73.) The contention that a six year old car is worth as much as it was when new is contrary to all experience. Nor is it claimed that the taxpayer's brother was an expert on the valuation of automobiles.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER, 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 747508 312